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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

* * * * *

KRISTINA RAPUANO, VASSIKI
CHAUHAN, SASHA BRIETZKE,
ANNEMARIE BROWN, ANDREA
COURTNEY, MARISSA EVANS, JANE
DOE, JANE DOE 2, AND JANE DOE
3,
Plaintiffs,

v.

TRUSTEES OF DARTMOUTH COLLEGE,

Defendant.
* * * * *

18-cv-01070-LM
October 17, 2019
10:13 a.m.

TRANSCRIPT OF SETTLEMENT CONFERENCE
BEFORE THE HONORABLE LANDYA B. McCAFFERTY

Appearances:

For the Plaintiffs: David Sanford, Esq.
Nicole Wiitala, Esq.
Steven J. Kelly, Esq.
Sanford Heisler Sharp LLP

C. Kevin Leonard, Esq.
Douglas Leonard & Garvey PC

For the Defendant: Joan A. Lukey, Esq.
Justin J. Wolosz, Esq.
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Court Reporter: Liza W. Dubois, RMR, CRR
Official Court Reporter
U.S. District Court
55 Pleasant Street
Concord, New Hampshire 03301
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1 P R O C E E D I N G S

2 (Off-the-record chambers conference held from
3 10:08 a.m. until 10:11 a.m.)

4 THE CLERK: This court is in session and has
5 for consideration a preliminary approval of a settlement
6 in civil matter 18-cv-1070-LM, Kristina Rapuano, et al
7 vs. Trustees of Dartmouth College.

8 THE COURT: Okay. Let me just have counsel
9 introduce themselves for the record. Just state your
10 name and spell your last name for our court reporter.

11 MR. LEONARD: Good morning, your Honor. Kevin
12 Leonard as local counsel from Douglas, Leonard & Garvey.
13 Last name is L-e-o-n-a-r-d.

14 MR. SANFORD: Good morning, your Honor. David
15 Sanford of Sanford, Heisler, Sharp, S-a-n-f-o-r-d, for
16 the plaintiffs.

17 MS. WIITALA: Good morning, your Honor.
18 Nicole Wiitala, W-i-i-t-a-l-a, for the plaintiffs.

19 MR. KELLY: Good morning, your Honor. Steve
20 Kelly, K-e-l-l-y, for the plaintiffs.

21 THE COURT: Okay.

22 MS. LUKEY: Good morning, your Honor, Joan
23 Lukey, with me, my partner Justin Wolosz for the
24 defendant trustees. And I just wanted to alert the
25 Court that in the event there are specific questions

1 that are unique to class action procedure here,
2 Mr. Wolosz will address them as opposed to me.

3 THE COURT: Okay. All right.

4 MR. WOLOSZ: And Wolosz is W-o-l-o-s-z.

5 THE COURT: All right. Excellent.

6 Let me -- my approach to this kind of hearing
7 is to really give you a sense of what my questions are
8 and then have you be fairly direct in your responses.
9 And then I will give you an opportunity at the end to
10 say whatever it is you'd like to say, direct my
11 attention to anything that you want me to read or think
12 about.

13 So let me -- let me just sort of set the stage
14 by way of the three stages in this process.

15 This is the first of three stages. This is
16 where you are proposing a settlement and asking for
17 preliminary approval. And as part of that, you're
18 asking me to -- really to conditionally certify a
19 settlement class; the second stage would involve notice
20 to the class and give class members the fair opportunity
21 to object or appear at a fairness hearing; and then the
22 final stage would be final court approval of the
23 settlement.

24 Now, oddly, Rule 23 really did not outline
25 this process until 2018, recently, and the -- provided a

1 standard for the preliminary approval process. That
2 standard is now set out in Rule 23(e)(1)(B) and moving
3 parties must show that -- essentially, a likelihood that
4 the Court will approve the settlement proposal and
5 certify the class.

6 So the focus of the hearing today, really, is
7 on the likelihood -- really, the likelihood on the
8 merits, if you will, of this class certification.

9 So I'm going to have some questions for you at
10 the outset about whether or not to certify this class.
11 And I can tell you that there are -- as you can imagine,
12 there's much momentum, positive momentum, behind this
13 settlement proposal that you both have filed and that
14 you both are litigating jointly right now in support of
15 and there are numerous positives to commend this
16 settlement, which I don't need to go over. I'm sure
17 you're both aware of them. But certainly it allows the
18 women victims to maintain anonymity and privacy as
19 absent class members rather than forcing them to file
20 their own lawsuits and publicly disclose sensitive and
21 highly personal facts.

22 It contains a provision, significant amount of
23 money in terms of programmatic relief at Dartmouth. It
24 provides closure and some sense of vindication while
25 also avoiding litigation.

1 So all the momentum, really, frankly, points
2 in the direction of approval, but the one hurdle is just
3 the certification of the class and whether or not it
4 meets the legal requirements. So that's going to be the
5 focus of the hearing today.

6 I have studied -- I have studied the other
7 main substantive issues with respect to this settlement
8 proposal and the majority of the other issues look to be
9 solid and look to be likely to be approved.

10 The problem or at least the hurdle for me at
11 this point is just class certification. So primarily
12 the issue of predominance and commonality -- and my
13 sense is that there really aren't many cases out there
14 where judges have opined -- and I'm hopeful that you can
15 tell me that I'm wrong about this, I just haven't found
16 them yet -- where judges have opined that this kind of
17 class in a Title IX or even a Title VII type case, this
18 type of class meets the commonality and predominance
19 requirements.

20 I will say that those cases that have approved
21 and certified such a class seem to be cases like this
22 one where both sides are in agreement, where all the
23 momentum for all the reasons I just stated points in the
24 direction of everybody wanting to approve the
25 settlement, including the Court, and so there really

1 isn't a great deal of analysis, legal analysis, on the
2 question of commonality and predominance, which are the
3 two issues that I'm struggling with.

4 So I think maybe the best place to start is
5 just talking about the definition of the class and how
6 the class is defined.

7 And I will tell you that a case that is fairly
8 close in terms of being on point, a Title IX case, a
9 very disturbing case, as this one is, involving fourth
10 graders in Shelby County, Alabama. It's called *Hurt v*
11 *Shelby County*. And I'm hopeful that you're prepared to
12 tell me why that case is wrong and why it is applying
13 the *Walmart* case incorrectly. Because if it's not
14 wrong, that presents somewhat of a legal hurdle for the
15 Court.

16 And, again, I'm eager to have more cases --
17 have you point me to more cases -- frankly, cases that
18 are post-*Walmart*, which would be I think post 2011, on
19 this question. And it may be that ultimately you're
20 empty-handed and what it may take is just for you to --
21 to explain to me today or perhaps in subsequent briefing
22 why *Hurt* is just wrong. And hopefully you're prepared
23 to help me with that question.

24 But let me go right to the definition of your
25 class.

1 Okay. Of course, I'm at page 6 of your joint
2 brief and I'm looking at the definition of the class.

3 Now, in *Hurt*, the class was described as
4 fourth grade students who had been abused, sexually
5 abused, by this teacher who had been teaching at the
6 school for some 25 years. So students who'd been abused
7 physically, students who had witnessed the abuse, or
8 students who otherwise encountered the abuse.

9 And, again, I'm doing that from the top of my
10 head, but I could lay that out for you more
11 specifically.

12 And the Court in *Hurt* used that definition as
13 a real starting point in terms of analyzing why it
14 doesn't meet the *Walmart* commonality test and it's
15 because they didn't suffer from the same injury. So
16 ultimately it comes down to that. Here you've got the
17 class and the dates end on the day that the three
18 professors were terminated or left, August 31st of 2017.

19 Where does the April 1, 2012, date come from?
20 Is that -- that wasn't apparent to me from --

21 MR. SANFORD: Well, your Honor, the class
22 period, as defined in the papers before the Court, was
23 really the subject of a lot of debate and negotiation in
24 three days of settlement talks, too, with Judge Morrill.

25 Plaintiffs wanted to go back further.

1 Defendant wanted it to be a shorter class period. And
2 ultimately we resolved --

3 THE COURT: Okay.

4 MR. SANFORD: -- on the three-year lookback
5 prior to the statutory period beginning under law at
6 2015.

7 THE COURT: Okay.

8 MR. SANFORD: So it was a negotiated
9 compromise.

10 THE COURT: All right. Thank you for that.

11 Okay. So you've got -- you've got the nine
12 named representatives and the descriptions of what
13 occurred to them are just -- is just egregious and
14 abhorrent. And so the question becomes as in the *Hurt*
15 case, do -- are -- is the harm that was suffered by
16 those nine class representative plaintiffs, is that
17 typical; is that -- and the definition of the class, as
18 in the class in *Hurt*, would suggest that the harm is
19 different for different class plaintiffs because (iv)
20 certainly lays out graduate students within a certain
21 time frame who don't fit the above categories, which
22 don't talk in terms of injury, I'm not suggesting that,
23 but -- but are defined in terms of what type of injury
24 they will attest to: dignitary, emotional, educational,
25 and/or professional harm during this period.

1 And so, now, you know, *Hurt* is a District of
2 Alabama case and it's construing the *Walmart* decision.
3 It is a Title IX case, so ultimately I paid close
4 attention to it as I prepared for this.

5 So that would really be -- that's my main
6 question today and I'm -- I'm eager to hear -- hear from
7 counsel on how you would respond to that *Walmart-Hurt*
8 argument that the injury is different or could be
9 different for each plaintiff in the class. Certainly
10 the harm to the nine named plaintiffs is somewhat
11 similar, but, again, you would know from discovery, from
12 investigation, what kind of harm these class -- putative
13 class members suffered and how different it would be.

14 So that's really the main -- in my mind, the
15 main hurdle in terms of preliminary approval and I -- I
16 will not deny approval without giving you an opportunity
17 to fully brief this issue after this hearing today, if
18 that's something that you think would help. It's also
19 possible you may be able to dispel my concerns right
20 now.

21 So go ahead.

22 MR. SANFORD: Okay. Well, thank you, your
23 Honor. I appreciate that.

24 We would like an opportunity to brief that
25 issue, if that is okay with the Court.

1 THE COURT: That would be very helpful to the
2 Court.

3 MR. SANFORD: Yes.

4 I have been enlisted to appear today before
5 the Court at the last minute. Deborah Marcuse was
6 scheduled to be here, but she had a physical issue that
7 prevented her from coming.

8 So I am not prepared to argue the nuances of
9 *Hurt*. I am, however, familiar with *Walmart* and I am
10 familiar with the way in which *Walmart* could be applied
11 to this case. So if I may start with that, your Honor.

12 THE COURT: Go right ahead. Go right ahead.

13 MR. SANFORD: *Walmart* was a case that involved
14 the certification of a class involving over one million
15 people, I think upwards of 1.5 million people throughout
16 the country. And a central issue in the *Walmart* case
17 involved the discretionary autonomy given regional and
18 local managers to make pay and promotion decisions with
19 respect to its workforce.

20 The court held, 5-4 -- Supreme Court held 5-4
21 against certification, arguing that that level of
22 discretionary autonomy was not sufficient in order to
23 meet the commonality standard; there had to be a common
24 nexus or glue, in the words of Justice Scalia, to hold
25 everything together in order to show the ultimate basis

1 and question for -- relating to a discriminatory
2 environment. And that is precisely what we have here in
3 this case, meaning Justice Scalia's concern about the
4 glue.

5 The glue in this case involves Dartmouth being
6 aware of the environment as a result of many complaints
7 being lodged going back to the early 2000s and going all
8 the way through the statutory period. And the question,
9 one, is whether Dartmouth was aware of the complaints;
10 and, two, whether it acted in a way that was sufficient
11 under the law in light of those complaints.

12 I think the evidence is indisputable based on
13 the investigation notes and based on class counsel's
14 investigation that Dartmouth knew over the period of
15 time in question about the behavior of three professors.
16 And I think it's also without question as far as class
17 counsel is concerned that Dartmouth did not meet its
18 obligations under the law to deal with those complaints.

19 And so the question -- the common question for
20 purposes of class certification is, you know, whether
21 Dartmouth knew and what it did about its knowledge, if
22 anything. And the evidence in this case suggests that
23 commonality is met and predominance is met because that
24 question of what Dartmouth knew and what it did in light
25 of its knowledge really predominates over any

1 individualized issues or defenses that may come up.

2 So under the -- under the law, class
3 certification law generally in this country as it's been
4 applied by courts, I don't think there's any question
5 that plaintiffs in this case meet the commonality and
6 predominance requirements.

7 How that relates to *Hurt*, again, your Honor,
8 we'd be very happy to brief for the Court.

9 THE COURT: Okay. The court in *Hurt* starts
10 out by quoting from *Walmart* and basically quotes the
11 section of *Walmart* talking about commonality requiring
12 the plaintiff to demonstrate that the class members have
13 suffered the same injury. And that that goes to the
14 commonality question.

15 And some of the questions that you're linking
16 to with respect to the defendant's awareness of, and
17 deliberate indifference toward, those questions were, I
18 think, also raised in *Hurt* and the court in *Hurt*
19 essentially looked at the different -- the different
20 injuries and said, because the plaintiffs, class
21 plaintiffs, suffered different injuries, there's just no
22 way they can meet the -- the *Walmart* standard because
23 some were actually molested and some were simply exposed
24 to that toxic environment.

25 So I'm going to give you just some quotes at

1 the end of the decision. This -- the Court says, and I
2 quote: Material factual differences prevail between the
3 named plaintiffs and the putative class. Each of the
4 named plaintiffs claims to have suffered direct physical
5 molestation at Mr. Acker's hands.

6 Such is not necessarily the case with the
7 class they seek to represent. The class would include a
8 potentially large group of female students whose
9 participation in the case depends simply on their
10 membership within one of Mr. Acker's fourth grade
11 classes over the roughly 25 years he taught.

12 As noted, this group would include female
13 students who had no awareness of Mr. Acker's abuse
14 whatsoever; they may have, indeed, a Title IX claim
15 against the board for placing them in such a situation,
16 but their injuries are distinct from the named
17 plaintiffs.

18 And that is the basis of the holding of the
19 *Hurt* court and the *Hurt* court essentially denies
20 certification on that basis.

21 So --

22 MR. SANFORD: Well, your Honor, a few things.

23 First, I would note for the Court that *Walmart*
24 does not overturn *Teamsters*. *Teamsters* is a Supreme
25 Court case going back to the 1970s.

1 And in the *Teamsters* case, which was a class
2 discrimination matter, the Court acknowledged that there
3 could be a two-stage process, one determining liability
4 and one determining damages, and there's nothing in
5 *Walmart* that contravenes *Teamsters*.

6 And I would say that similarly here, when
7 you're dealing with damage issues, essentially,
8 injuries, to individuals giving rise to certain damages,
9 I think that's distinct from the question of classwide
10 liability, which is recognized, again, in *Teamsters* as a
11 separate issue.

12 So the question is can we establish classwide
13 liability through common questions meeting the
14 commonality and predominance requirements, recognizing
15 that individuals may not have identical injuries.

16 I don't think *Walmart* suggests that everyone
17 affected in a class has to be identical injuries. If
18 that were the case I think there would never be any
19 class certified. There are going to be certain people
20 in this class who suffered dignitary harm. There are
21 going to be certain people who suffered physical harm.
22 There's -- there are going to be certain people who
23 suffered emotional harm or educational setbacks or some
24 combination of those.

25 THE COURT: Will there be any people in the

1 class, the putative class, who suffered no harm?

2 MR. SANFORD: In our class?

3 THE COURT: Yes.

4 MR. SANFORD: Not that I'm aware of, and if
5 that were the case, they wouldn't receive any money.
6 Because there's a class -- there's a group of
7 individuals who have to attest as part of the process
8 that they were harmed in some way in order to just get a
9 thousand dollar base payment. And if they can't do
10 that, then they would not take under the terms of the
11 settlement agreement.

12 THE COURT: Okay. I thought that under the
13 class definition it included a set of named students and
14 that those all received that base thousand dollar --

15 MR. SANFORD: The named -- the named
16 individuals on the caption do; the -- the --

17 THE COURT: Okay.

18 MR. SANFORD: -- class representatives do.
19 But in terms of the class members, there is a group that
20 fell outside the orbit -- they were in the department,
21 but fell outside the orbit of the three professors.
22 With respect to that group, if they didn't suffer any
23 harm because they just weren't a part of any activities
24 or didn't witness anything, then presumably they would
25 not be able to sign an affidavit under oath saying that

1 they did and, therefore, they would not receive any
2 money under the terms of the settlement agreement.

3 THE COURT: Okay. So you're talking about in
4 the definition of the class, A(iv), those individuals?

5 MR. SANFORD: If I may, your Honor, is that --

6 MS. WIITALA: Correct.

7 MR. SANFORD: Yes, that's correct, from my
8 colleague.

9 THE COURT: A(i), any graduate student advisee
10 of Heatherton, Kelley, or Whalen between those dates,
11 those are all presumed to be victims?

12 MS. WIITALA: Correct.

13 MR. SANFORD: Yes, that's correct, your Honor.

14 THE COURT: Okay. And the discovery that
15 you've done, the investigation, would support that?

16 MR. SANFORD: Yes, your Honor.

17 THE COURT: Okay. So there's no graduate
18 advisee of any of these people who would not qualify for
19 the \$1,000 base?

20 MR. SANFORD: Correct.

21 THE COURT: Okay. Same for teaching or
22 research assistants with those three people?

23 MR. SANFORD: That is correct.

24 MS. WIITALA: Correct.

25 MR. SANFORD: Yes, your Honor.

1 THE COURT: Okay. And then the same for the
2 graduate students in that department.

3 I didn't quite understand the coauthorship
4 requirement, but I'm sure there's some reason for that
5 in terms of limiting the scope of this. But, A(i),
6 (ii), and (iii) all get the base amount.

7 Can you tell me a little bit about A(i), (ii),
8 and (iii) in terms of what the discovery and
9 investigation revealed? Certainly the nine -- the
10 complaint in the case would certainly suggest each
11 individual named plaintiff felt and noticed the toxic
12 environment, I think on day one, which would lead one to
13 believe that other members would -- other students would
14 as well, but I'm just curious what kind of sort of
15 pervasiveness there was with respect to the
16 investigation.

17 MR. SANFORD: I think my colleagues here could
18 speak more to the details of that, but as I understand
19 it, your Honor, this is a fairly tight-knit, small group
20 that interacted quite a lot formally and informally,
21 both in the class and outside of the class and
22 interacted socially, both -- just among students and
23 between students and faculty.

24 And in that context, there were a lot of
25 interactions between and among students and faculty that

1 were inappropriate. And many of those students -- I
2 don't know that every single one of them, but certainly
3 many, and we believe the majority of them, witnessed at
4 one point or another inappropriate behavior,
5 inappropriate behavior during interactions with alcohol,
6 inappropriate behavior as a result of groping and sexual
7 innuendo.

8 And so I think that in light of the
9 investigation as we understand it, the Title IX
10 investigation at Dartmouth, the internal investigation
11 by Dartmouth, our own investigation, which included,
12 your Honor, 36 conversations with 36 distinct
13 individuals -- or, actually, more than 36 conversations,
14 but conversations with 36 different witnesses to the
15 behavior by people who experienced it themselves or
16 witnessed it occurring on campus or off campus.

17 So there is enough there to support an
18 environmental claim, a hostile environment claim. These
19 aren't, obviously, isolated incidents that go way back.
20 They're repeated incidents that occurred over many, many
21 years and reported over many, many years.

22 MR. KELLY: David -- if I could add, your
23 Honor --

24 THE COURT: Sure.

25 MR. KELLY: -- just the -- with regard to the

1 professional interactions, there was a lot of evidence
2 revealed, as Mr. Sanford said, in the Title IX
3 investigation, in our investigation, and even in our
4 interactions with our clients where academic attention
5 by these three professors was conditioned upon two
6 things: number one, sort of acquiescing to sexual
7 advances, but number two was being part of this drinking
8 culture in which, you know, the -- in order to get
9 attention, academic attention, from these three
10 professors, you had to go drinking with them and you had
11 to go to their parties at their house where
12 inappropriate jokes were being told, where sexual
13 advances were being made.

14 So there's a lot of evidence that if you
15 worked with these individuals professionally as a woman
16 that, you know, even if they weren't sexual -- you know,
17 actively, you know, sexually harassing the student that
18 they were subjecting as a -- as an advisee or as someone
19 who was working professionally with these women, you
20 were being subjected to these -- you know, this hostile
21 environment.

22 THE COURT: Okay. Thank you. I -- in
23 researching some of the cases, I did find -- and, again,
24 this would be another area, I think, that would help me
25 if you addressed it in some way in further briefing.

1 This is an older case, 2002, *Elkins vs. Showa*, and let
2 me tell you where that's from. It's Ohio, Western
3 Division, Ohio. And what the plaintiffs failed to do in
4 that case, it seems to me the plaintiffs could
5 successfully do in this case.

6 In *Elkins*, the plaintiffs failed to offer any
7 evidence that established that it was a plant, that
8 there was plant -- the plantwide environment was hostile
9 and the evidence failed to show a common practice or
10 pattern or an equally egregious level of sexual
11 harassment among the various areas of the plant, among
12 the employees supervised by different supervisors, and
13 working with different coworkers and among the employees
14 on different shifts.

15 So that -- that language seemed to at least
16 give me a theory on which I could hang a commonality
17 finding, but I -- I would -- again, it would be
18 something that would be helpful to have from -- from you
19 in a -- in a jointly filed brief after this hearing.

20 And it does predate *Walmart*, but it -- it at
21 least gave me a theory on which to hang a commonality
22 finding.

23 Numerosity I don't see as an issue. I think
24 that's established.

25 And adequacy, again, I -- the question of

1 adequacy, I think, is answered on the face of your --
2 of your pleading, your brief.

3 The interests of the representative parties
4 will not conflict with the interests of any class
5 members, number one, and chosen counsel's qualified,
6 experienced and able to vigorously conduct the
7 litigation or ultimately the settlement.

8 The questions, again, that I had were just --
9 were commonality and predominance.

10 And I interrupted you, so I want to make sure,
11 Mr. Sanford, that you get an opportunity to finish. I'm
12 going to ask -- I believe it would be Mr. Wolosz who
13 would address the procedural questions with respect to
14 the class and then ask you both to just direct me to
15 whatever else you want to direct my attention to in
16 terms of any aspect of this preliminary approval
17 process.

18 I just wanted to make sure you knew where my
19 hang-up was, at least in terms of trying to find the
20 rationale for the finding of commonality and
21 predominance.

22 MR. SANFORD: Thank you, your Honor. No, we
23 are more than happy to brief the issue and address the
24 Court's concerns. And I don't know that I have anything
25 further to add at this point.

1 THE COURT: Okay. All right.

2 MR. SANFORD: Thank you.

3 THE COURT: Attorney Lukey, it would be
4 Attorney Wolosz?

5 MS. LUKEY: Attorney Wolosz. Thank you.

6 THE COURT: Thank you.

7 MR. WOLOSZ: Thank you, your Honor. Just very
8 briefly.

9 So as the defendant here, you know, we're a
10 little differently situated. We assent to the relief
11 we're not opposing, but, you know, if this were to be a
12 contested motion for class certification, we would be.
13 And I think the law is clear that that's okay and, in
14 fact, the 2018 amendment includes some commentary that
15 says that, that the position taken in connection with
16 settlement is irrelevant if later on there needs to be a
17 contested, but --

18 THE COURT: I noted in the brief that you
19 indicated that you would strongly disagree with
20 certification were this case fully litigated and not
21 settled. So I was eager to hear on what basis would you
22 strongly disagree with certification and is it along the
23 lines of some of my questions or is it -- can you
24 elucidate?

25 MR. WOLOSZ: Well, I think it is -- so if we

1 were in a different universe, if this were a contested
2 motion for class certification, I think that we would go
3 through each of these elements and we would have a
4 number of arguments to make in opposition.

5 We are not -- and you said your brief; it's
6 actually the plaintiffs' brief. We're -- again, the
7 college is not opposing certification and certainly
8 supports, you know, and assents to the approval of the
9 settlement. It's a settlement agreement that the
10 college has signed. But it's a -- you know, it's a
11 difficult position for us to argue forcefully against
12 class certification because we are -- we're not opposed
13 to it. And I think --

14 THE COURT: It may help the Court, though, to
15 hear what some of your arguments are, allow them to
16 respond, and then I would give them an opportunity to
17 further brief the question and I would then write my
18 order, presumably approving the settlement, with a
19 rationale for commonality and predominance that makes
20 legal sense to me and is consistent with the law.

21 Obviously I -- I could simply just provide
22 approval, but there is this legal hurdle that I have to
23 find a likelihood that this class is a class I would
24 certify under the law. And so I will be following the
25 law in deciding whether I approve the certification and

1 so it may help the Court if you could articulate --

2 MR. WOLOSZ: Sure.

3 THE COURT: -- for the Court what you see to
4 be some of the strongest cases that you would rely on
5 and arguments that you would make and then I would allow
6 plaintiffs to give me the counter to that and even
7 further brief that.

8 MR. WOLOSZ: So, perhaps I can start with the
9 *Amchem* chemicals United States Supreme Court case,
10 because it obviously factors in here since we are
11 talking about settlement and since that's the case that
12 said that the Court still has to go through the elements
13 of class certification.

14 THE COURT: What case is that?

15 MR. WOLOSZ: That's the *Amchem* chemicals.

16 THE COURT: Yes, okay.

17 MR. WOLOSZ: It's 521 U.S. 591, vs. Windsor.

18 And one thing that that case says is that --
19 is that you need not consider issues involving
20 manageability at trial --

21 THE COURT: Right.

22 MR. WOLOSZ: -- if you're talking about
23 approval of a settlement. That's very important here,
24 because that would be a big factor that we would point
25 to in opposing a litigated class certification. We

1 would say because of the differences -- you know, even
2 if folks were exposed to the same type of thing, even if
3 plaintiffs could prove that on a classwide basis, we
4 would say at some point there has to be a presentation
5 and it would need to be kind of a plaintiff-by-plaintiff
6 presentation and that raises significant manageability
7 issues with respect to trial.

8 We don't have to do that because the Court was
9 clear that when there's a settlement, you don't have to
10 worry about the manageability at trial and, in fact, the
11 settlement agreement sets forth the way in which
12 plaintiffs have proposed to deal with those differences
13 and to have them presented and addressed, as you pointed
14 out, in a confidential manner.

15 In terms of the other elements, commonality
16 and predominance, we would be pointing to those same
17 differences. We would be saying that, you know, the --
18 the nature of this type of allegation is specific to
19 what the exposure was and, in particular, how the
20 individual was harmed by it.

21 I don't necessarily agree that damages --
22 differences in damages are irrelevant. We would say if
23 this were a contested motion that that overstates it a
24 bit, that you do need to actually dig into whether there
25 is -- there's a commonality of harm and whether the --

1 there's some mechanism to deal with the damages, but,
2 again, that bumps up against the manageability at trial.

3 So these are arguments we would present in a
4 full-throated way if this were a litigated motion for
5 class certification that we don't have to here.

6 And I'd add one other thing, your Honor.
7 There's a -- there's a recent en banc opinion from the
8 Ninth Circuit. This is the *In re: Hyundai and Kia Fuel*
9 *Economy Litigation*. And I think that's important
10 because it talks about how the nature of a settlement is
11 something that you validly consider when going through
12 even the other elements of class certification.

13 The *Amchem* chemicals case is a little
14 confusing on that point because what the U.S. Supreme
15 Court said is it said -- and this was an asbestos
16 litigation, so it's very different from here. There
17 were going to be tens, if not hundreds of thousands of
18 people in the class.

19 And the Court said, well, you still have to do
20 the Rule 23 analysis. You don't have to do trial
21 manageability, that's something you don't have to worry
22 about; but the other elements, you have to go through
23 them because there are going to be people precluded from
24 bringing claims down the road and so you need to be sure
25 that there's a valid basis for certification.

1 But what the Supreme Court also said is that
2 it was -- it was appropriate that the -- the court below
3 had looked at the existence of a settlement, at least
4 when performing some of those analyses.

5 So it was a little unclear what exactly they
6 were saying, how the settlement factors in. They're
7 clearly saying you can't just say as long as there's a
8 settlement, dispense with Rule 23. You still have to go
9 through the elements.

10 THE COURT: It's a less rigorous analysis is
11 what you're saying?

12 MR. WOLOSZ: Well, so --

13 THE COURT: I note you had cases in the brief
14 or plaintiffs' brief about that and I didn't know if
15 that was still good law after the 2018 amendment. And
16 that certainly is helpful to the Court that I -- it
17 doesn't have to be as rigorous an analysis.

18 MR. WOLOSZ: Yes.

19 THE COURT: Would you suggest that's still the
20 law?

21 MR. WOLOSZ: I would. And so this Ninth
22 Circuit case, *In re: Hyundai* -- I'll note, your Honor,
23 that in your *Holt vs. FoodState* case, where you talked
24 about *Amchem* chemicals and you talked about the
25 obligation to go through the elements, you had cited --

1 that was a different issue; you were dealing with a
2 nationwide class and whether differences in state laws
3 would defeat certification.

4 And you talked about how courts have come down
5 different ways and you cited a Ninth Circuit panel
6 opinion in the *In re: Hyundai* case, which had denied
7 certification or, actually, the Ninth Circuit panel and
8 I think reversed and said, no, you can't certify a
9 nationwide class because there are differences between
10 class members because there's a bunch of different
11 states.

12 After your Honor issued that opinion citing to
13 that panel decision, the -- the Ninth Circuit took that
14 case in an en banc review and reversed and said -- and
15 said, no, you can certify nationwide because you can
16 consider the settlement. And here's a quote from that
17 case that -- that case, by the way, is 2019 Westlaw
18 2376831. And that was issued June 6th, 2019.

19 And here's a quote that I think is important
20 for the Court's current -- the issues currently before
21 the Court: A class that is certifiable for settlement
22 may not be certifiable for litigation if the settlement
23 obviates the need to litigate individualized issues that
24 would make a trial unmanageable.

25 THE COURT: Okay. That's very helpful.

1 MR. WOLOSZ: So this is -- these are really
2 important principles to us as the defendant because,
3 again, we're in this position where we're not opposing
4 if the settlement is granted. If the settlement were
5 not granted and we were litigating this case, we would
6 be. And so that's why I sort of keep coming back to
7 these -- these notions.

8 I'll also note that there's another comment to
9 the 2018 amendment which says -- this is from paragraph
10 12 of the comment -- the comments. It says: Although
11 the standards for certification differ for settlement
12 and litigation purposes -- then it goes on to talk about
13 the record. But there's acknowledgment that the
14 standards for certification differ for settlement and
15 litigation purposes.

16 THE COURT: Okay. Excellent. Thank you very
17 much. That's very helpful.

18 All right. Attorney Sanford, would you like
19 to be heard further?

20 MR. SANFORD: Just briefly, your Honor.

21 I think the *In re: Hyundai* case is
22 instructive, even though it is a Ninth Circuit case, and
23 I also would emphasize the *Amchem* case. The Supreme
24 Court did hold specifically that settlement is relevant
25 to a class certification. And that's at 521 U.S.

1 391-619 (sic).

2 The advisory notes, committee notes, to the
3 federal rules clearly hold that the standards differ for
4 settlement. Newberg on Class Actions supports that
5 principle.

6 The First Circuit clearly has come out
7 encouraging settlement in *U.S. v. City of Portsmouth*,
8 which is actually a District of New Hampshire case
9 resolved in 2013, and there's language to that effect as
10 well.

11 So I think we can certainly provide the Court
12 supplemental briefing and scour the literature to give
13 the Court comfort regarding cases not only in this
14 jurisdiction, but in circuits around the country to
15 support the proposition that the -- there is a less
16 rigorous analysis even post-2018.

17 THE COURT: Excellent. All right. This has
18 gone a long way toward making the Court feel as though
19 this -- this may be an easier section of an order to
20 write than I thought before taking the bench, but I will
21 give you the opportunity to make it even easier for me.

22 Would you need 14 days?

23 MR. SANFORD: 14 days would be fine, your
24 Honor.

25 THE COURT: That would be fine? Okay. And

1 there wouldn't be any need for any sort of response, so
2 in 14 days I'll have the issue fully joined and I can
3 get you a written order out.

4 Is there anything else before I get off the
5 bench, though, that we should cover at this -- at this
6 stage?

7 MR. SANFORD: If I may, your Honor, take a
8 minute?

9 THE COURT: You may.

10 MR. SANFORD: Nothing further at this time,
11 your Honor.

12 THE COURT: Okay. Attorney Lukey, do you need
13 to be heard?

14 MS. LUKEY: Nothing from us, your Honor.

15 THE COURT: You're good. Okay. All right.
16 Those were my -- my main concerns and today's gone a
17 long way toward addressing those. I appreciate that.

18 And everything else in the brief made perfect
19 sense to the Court in terms of what you've done here and
20 I commend counsel for reaching this creative -- this
21 creative settlement in this case. And now I will do my
22 job in the next stage and get out a decision for you
23 pretty quickly.

24 All right. I think that's all. Anything
25 further before I get off the bench?

1 MR. SANFORD: No, your Honor.

2 MS. LUKEY: No, thank you, your Honor.

3 THE COURT: Thank you very, very much.

4 Appreciate it.

5 MS. LUKEY: Thank you, your Honor.

6 (Proceedings concluded at 10:58 a.m.)

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C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 10/23/19

/s/ Liza W. Dubois
LIZA W. DUBOIS, RMR, CRR